THE REED "BONE-DRY" AMENDMENT.*

THE so-called "Bone-dry" Amendment to the Post Office Appropriations Act, approved March 3, 1917, originated in an amendment offered by Senator Reed [1] to an amendment proposed by Senator Jones [2] excluding from the mails in certain cases advertisements of, and solicitations for orders for, "spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind."

The effective date of the Jones Amendment as amended by the Reed Amendment (Section 5 of the Act) was, by Joint Resolution of March 4, 1917, postponed to July 1, 1917.

The Reed amendment provides:

> "Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal and mechanical purposes, into any State or Territory, the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes, shall be punished as aforesaid: Provided, that nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State."

Prior to the passage of federal legislation upon the subject, the States were hampered in their attempts to control the liquor traffic by the principle that the silence of Congress indicated its will that the interstate transportation of intoxicating liquor should not be regulated by the States and that, therefore, the States could not prevent its importation, sale, or disposi-

*EDITORIAL NOTE: For a full discussion of the previous history of the subject of intoxicating liquors in interstate commerce, see the series of articles entitled, "Interstate Commerce in Intoxicating Liquors before the Webb-Kenyon Act," 4 VA. LAW REV. 174, 288, 353; and "The Webb-Kenyon Decision," 4 VA. LAW REV. 558, all by Prof. Lindsay Rogers.

[1] CONGRESSIONAL RECORD, 64th Congress, 2nd session, pp. 3758, 3762.

[2] CONGRESSIONAL RECORD, 64th Congress, 2nd session, p. 3747.

tion before it had lost its interstate characer, *i. e.,* while in the original package.[3]

In 1890, Congress enacted the Wilson Act,[4] which removed the disability of the States in so far as the sale or disposal within a State of imported liquor after delivery therein was concerned, but did not so operate as to permit the States to prevent the importation of liquor and its delivery to the consignee.[5]

The States were not yet in a position to control the liquor traffic, despite their power to prevent sale or disposal, even in the original package, after delivery, because of their inability to prevent importation and delivery to the consignee. To meet this situation, Congress passed the so-called Webb-Kenyon Act,[6] which prohibits the interstate transportation of intoxicating liquor when it is intended to be "received, possessed, sold, or in any manner used" in violation of the law of a State. This Act, which was upheld by the United States Supreme Court in James Clark Distilling Co. *v.* Western Maryland Ry. Co.,[7] has given the States full control of the subject-matter, and enabled them to entirely exclude intoxicating liquor by forbidding its receipt, possession, sale, or use.

The Reed Amendment represents a reversal of the former policy of Congress, in that it operates not as a permission to the States but, in the cases to which it applies, as a restriction upon the States. Congress, thereby, through the medium of its power over interstate commerce, enters into the field of the exercise of police power within the States. If a State forbids the manufacture or sale of intoxicating liquor for beverage purposes, although it permits its importation and receipt for personal use or otherwise, Congress steps in and entirely forbids the importation into such State, except for scientific, sacramental, medicinal and mechanical purposes, thus setting aside the State law so far as importation is thereby permitted.

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[3] Bowman *v.* Chicago, etc., Ry. Co., 125 U. S. 465 (1888); Leisy *v.* Hardin, 135 U. S. 100 (1890).

[4] Act of August 8, 1890, 26 Stat. L. 313, U. S. Comp. '16, § 8738.

[5] American Express Co. *v.* Iowa, 196 U. S. 133 (1905).

[6] Act of March 1, 1913, 37 Stat. L. 699, U. S. Comp. '16, § 8739.

[7] 242 U. S. 311 (January 8, 1917). [See discussion of this decision by Prof. Lindsay Rogers, 4 VA. LAW REV. 558.]

The provision is not happily expressed. It penalizes any one who "shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, into any State," etc. The words "order" and "purchase" do not fit into the grammatical construction of the sentence. Let us, however, pass on to more substantial difficulties.

For the sake of brevity and convenience in the subsequent discussion, let us paraphrase the language of the provision and treat it as if it read:

> "It shall be unlawful (except for scientific, etc., purposes) to import intoxicating liquors into a State the laws of which prohibit the sale of intoxicating liquors."

The question arises as to the proper construction of the Act in a case where a State prohibits the sale of intoxicating liquor for beverage purposes in certain places and permits it in others (*e. g.*, under a local option law, where prohibition or permission depends upon the result of a local balloting). In such a case, does the federal act permit the importation of liquor into the "dry" territory of such State? The prohibition is against transportation into any State, the laws of which forbid sale therein. The offense described is not the importation into a given place in the State but the importation (across the line) into the State. The States to which the provision applies are those which forbid the sale therein. Neither the letter nor the spirit of the clause justifies an interpretation which would altogether exclude intoxicating liquors from a State which forbids the manufacture or sale thereof only at some place or places therein. Such an interpretation would exclude liquor from a "wet" State if it should, for example, forbid the sale of liquor within a certain distance of a school house. The Act deals with entire States and not with parts of States. Unless prohibition of sale is statewide, the Act does not apply.

The prohibition is against importing into certain States "intoxicating liquors." What are intoxicating liquors? State statutes prohibiting the sale of intoxicating liquors define the term (for the purposes of such statutes) in varying ways. Frequently it is provided that liquors containing a given percentage of alcohol shall be deemed intoxicating liquors. As the phrase

is not defined in the Reed Amendment, what shall it be deemed to include? A definite percentage of alcohol cannot be adopted as the test; for the capacity of a liquor to produce intoxication will depend upon the nature of other ingredients.[8] In the absence of statutory definition, the question whether a given fluid is intoxicating liquor can only be answered by determining whether it will produce intoxication, and that is a question of fact to be ascertained upon evidence, unless the liquid be such (*e. g.*, whiskey) that the court will take judicial notice that it is intoxicating.[9]

The same term is used in the Act in another place. The States as to which the prohibition is applicable are those which prohibit the sale (for beverage purposes) of "intoxicating liquors". Does the term mean the same thing here as when first used? How are we to determine which are the States which prohibit the sale of intoxicating liquors? Suppose that a State should prohibit the sale of absinthe and permit the sale of all other intoxicating liquors. Is such a State one that prohibits the sale of intoxicating liquors for beverage purposes? To so construe the Act would not be in accordance with the presumed intent of Congress. Such a State would not be considered a "dry" or "prohibition" State. Reverse the case and suppose that the State should permit the sale of one kind of intoxicating liquors and prohibit the sale of all other kinds. Would the result be different? Take the law of North Carolina as an example. A statute of that State [10] altogether prohibits the manufacture and sale of intoxicating liquors, except that it permits the manufacture and sale of wine if sold at the place of manu-

[8] In Geer Drug Co. *v.* Atlantic, etc., R. Co., 104 S. C. 207, 88 S. E. 448 (1916), the court held that the Pabst "Best Tonic," a product containing some five per cent. of alcohol, was not an intoxicating liquor, the record showing that "it would be impossible for any person to become intoxicated by its immoderate use for the reason that said person would become sick long before he became intoxicated".

[9] Cihak *v.* United States, 232 Fed. 551 (1916). In Thomas *v.* Commonwealth, 90 Va. 92, 17 S. E. 788 (1893), the court took judicial notice that apple brandy is intoxicating. For definitions of the phrase "intoxicating liquor," see 4 WORDS & PHRASES 3736; 2 WORDS & PHRASES, 2d series, 1176.

[10] Acts 1908, Ch. 71.

facture in packages of not less than two and one-half gallons. Is North Carolina [11] a State the laws of which "prohibit the manufacture or sale therein of intoxicating liquor for beverage purposes"?

The Act forbids the importation of intoxicating liquors into States falling within a certain description. The natural meaning of the language is that it prohibits the importation of all intoxicating liquors into such States. Is it possible to construe it to mean that if a State prohibits the sale of absinthe and permits the sale of all other intoxicants the federal act forbids the importation of absinthe only—in other words, is it possible to construe the Act as prohibiting the importation of some (but not all) intoxicating liquors into a State that prohibits the sale of such (but not all) intoxicating liquors? Such a construction does violence to the language of the provision. There would seem to be no justification for interpreting a prohibition against the importation into certain described States of intoxicating liquors as prohibiting the importation of certain kinds only of intoxicating liquors. Clearly the Act divides the States into two classes, (1) those that prohibit the sale of intoxicating liquors, and (2) those that permit it. Nor will the language of the provision bear the interpretation that the importation of all intoxicating liquor into States forbidding the sale of some intoxicating liquor is forbidden. The prohibition is applicable only to States which prohibit the sale of all intoxicating liquors. If a State be not entirely "dry" from a sales standpoint, it is not rendered "bone-dry" by the Reed provision.

The illustration taken from the North Carolina law is one where the State permits the sale of liquor (wine), which is admittedly intoxicating liquor not only in fact but under the terms of the State statute. For the purpose of further illustration, let us suppose that the State statute forbids the sale of "ardent spirits" or "alcoholic liquors" and defines the term used as liquors containing six per cent. or more of alcohol. Let us

[11] North Carolina was used by Senator Reed as an example of the class of states into which the importation of intoxicating liquor was to be forbidden by his amendment. CONGRESSIONAL RECORD, 64th Congress, 2nd session, p. 3753.

also make the assumption that liquor containing five per cent. or more of alcohol is in fact intoxicating. In such a case the State does not prohibit the sale of all intoxicating liquor; since it permits the sale of intoxicating liquor containing from five to six per cent. of alcohol. If the views above suggested are correct, such a State is not one the importation of intoxicating liquor into which is forbidden by the Reed provision, regardless of whether the intoxicating liquor sought to be introduced into the State is such that its sale is forbidden by the laws of the State. Suppose, however, that the State statute in terms prohibits the sale of "intoxicating liquors" but defines the term as liquors containing more than six per cent. of alcohol (liquor containing five per cent. or more of alcohol being still assumed to be in fact intoxicating). Is the case different from that last above suggested? Is the applicability of the federal act to depend upon the mere question of the terms used in the State statute regardless of the real character of the thing prohibited to be sold? Can it be correctly concluded that if the State statute does not use the term "intoxicating liquors" in its prohibition against sale we must ascertain whether all liquors which are in fact intoxicating are forbidden to be sold, but that if the State statute in terms forbids the sale of "intoxicating liquors" it is immaterial whether in fact the State has prohibited the sale of all liquors actually intoxicating? Consider the reverse case, taking, as an illustration, the Mapp Law of Virginia,[12] which prohibits the manufacture, sale, etc., of ardent spirits. Section one provides:

> "The words ardent spirits, as used in this act, shall be construed to embrace alcohol, brandy, whiskey, rum, gin, wine, porter, ale, beer, all malt liquors, absinthe and all compounds or mixtures of any of them; all compounds or mixtures of any of them with any vegetable or other substance; and also, all liquids, mixtures or preparations, whether patented or otherwise, which will produce intoxication; fruits preserved in ardent spirits, and all beverages containing more than one-half of one per centum of alcohol by volume, except as hereinafter provided."

[12] Acts of Virginia, 1916, Ch. 146, p. 216.

It is clear that Virginia has prohibited the sale for beverage purposes of all intoxicating liquors. It is equally true that it has gone further and prohibited the sale of liquors which are not intoxicating. Virginia is one of the class of States to which the Reed Amendment applies, and therefore the importation therein of intoxicating liquors is thereby prohibited. It can hardly be contended, however, that all the things falling within the definition placed upon "ardent spirits" in the Virginia statute are prohibited by the Reed Amendment to be imported into Virginia. A large class of liquors prohibited to be sold in Virginia are not in fact intoxicating liquors and are not so denominated by the Virginia law. But if we substitute the term "intoxicating liquors" for "ardent spirits" in the Virginia statute the legal situation would not seem to be affected. It is not to be supposed that Congress in enacting an act excluding intoxicating liquors from the State under certain circumstances, intended that harmless articles should be excluded from the channels of interstate commerce, so far as importation into a State is concerned, merely because they should be covered by the terms of the State prohibition statute, even though they should fall within a class denominated by such statute "intoxicating liquors."

The prohibition statute of West Virginia [13] prohibits the manufacture and sale of "liquors" and defines that term as including, among other things, "all malt or brewed drinks, whether intoxicating or not". How else can the applicability of the prohibition of importation in the federal act as to "malt or brewed drinks" be tested other than by ascertaining whether or not they are actually intoxicating? And, if this be true, the same test is to be applied, even though the liquor in question be denominated an intoxicating liquor in the State prohibition law.

The Georgia law [14] forbids the sale of "Prohibited Liquors and Beverages," and defines that term as including, among other things, "all liquors and beverages or drinks made in imitation of or intended as a substitute for beer, ale, wine or whiskey, or other alcoholic or spirituous, vinous, or malt liquors, in-

[13] Acts of 1913, Ch. 13.

[14] Acts of 1915, p. 77.

cluding those liquors and beverages commonly known and called near-beer." Surely it cannot be contended that the federal act prohibits the importation into Georgia of a non-intoxicating liquid merely because it is made in imitation of or intended as a substitute for, the liquors named in the statute and thereby falls within the terms of the State prohibition? What compass is there to steer by in construing the federal prohibition in respect to the importation of intoxicating liquors other than the test of whether they are actually intoxicating?

If the terms of state statutes are not controlling in determining what liquors are prohibited from being imported into a State which forbids the sale of all intoxicating liquors, it would seem that the terms of state statutes are not controlling in determining whether the State in question prohibits the sale of all intoxicating liquors.

In this connection it is interesting to note the language of the Webb-Kenyon Act. It is entitled, "An act divesting intoxicating liquors of their interstate character in certain cases," and provides (omitting words that are not interesting here) that, "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State * * * into any other State * * * which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, * * * is hereby prohibited." This Act and the Reed Amendment are to be considered *in pari materia,* in so far as the point under discussion is concerned. While the purpose of the former is to subject the importation of the liquors described to the control of the States and of the latter to divest the States of control over the importation of liquors in certain instances, yet in each the applicability of the federal prohibition is determined by the state law and the method of dealing with the subject-matter is similar. The language of the Webb-Kenyon Act seems clearly to confine the prohibition to articles actually falling within the description as a matter of fact, or, to express it differently, as a matter of fed-

eral law, and to exclude any contention that the applicability of the federal prohibition is dependent to any degree upon the description in the state laws of liquors, the receipt, possession, sale or use of which is made unlawful.[15]

The language of the Wilson Act is also of interest. That Act provides that, "All fermented, distilled, or other intoxicating liquors or liquids transported into any State * * * shall upon arrival in such State * * * be subject to the operation and effect of the laws of such State," etc. Evidently the State is here given control with respect only to the liquors in fact falling within the description in the federal act, and cannot, by virtue of the federal act, undertake to prevent the sale of articles not falling within that description by denominating them "fermented, distilled or other intoxicating liquors."

Attention is called to the exception contained in the Reed Amendment, *"except for scientific, sacramental, medicinal, and mechanical purposes."* The prohibition against sale contained in the state law may forbid sale for scientific, etc., purposes as well as for beverage purposes. Nevertheless, it is clear that the importation into a State of intoxicating liquors for scientific purposes is not a violation of the federal act. This indicates that it was not the purpose of Congress to make the applicability of its prohibitions coincident with the prohibitions contained in the State anti-sale laws.

It would seem that there is no way to escape the conclusion that the operation of the Reed Amendment is confined to prohibiting the importation (except for scientific, sacramental, medicinal and mechanical purposes) of all liquors in fact intoxicating into any State which prohibits the manufacture or sale for beverage purposes of all liquors in fact intoxicating.

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[15] If the views expressed in this article are correct, some of the States have undertaken to exclude liquids which are not covered by the Webb-Kenyon Act, and which are, therefore, not subject to state control when moving in interstate commerce.